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IN THE

Supreme Court of the United States

October Term, 1947.

No. ~~233 MISC.~~ 583

In the Matter
of
The Application of JOHN A. LYONS, as Commissioner of Correction of the State of New York,
Respondent-Petitioner,
For an Order directed to Honorable CARLTON A. FISHER, as Judge of the County Court of Erie County,
Respondent,
and
JOSEPH PATERNO,
Petitioner-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Statement

Petitioner prays for a writ of certiorari to review a decision of the New York Court of Appeals made on October 16, 1947, unanimously affirming an order of the Appellate

Division of the New York Supreme Court, Fourth Judicial Department, entered in the office of the Clerk thereof on April 30, 1947 (fol. 157)* which order unanimously affirmed an order of the Special Term of the New York Supreme Court, entered in the office of the Erie County Clerk on July 29, 1946 (fol. 7). This order of the Special Term of the Supreme Court, so affirmed, granted the application of respondent-petitioner John A. Lyons, as Commissioner of Correction of the State of New York, for an order prohibiting the Hon. Hamilton Ward, Jr., as Judge of the County Court of Erie County, from vacating the judgment of the Erie County Court entered on July 16, 1937, in an action entitled "*People of the State of New York* v. *Joseph Paterno.*"

While petitioner's appeal was pending in the State courts, the Hon. Hamilton Ward, Jr. became a Justice of the Supreme Court. Accordingly, his successor, the Hon. Carlton A. Fisher, as Judge of the County Court of Erie County, was substituted in his place in this proceeding by order of the Appellate Division, entered March 5, 1947 (fol. 147).

Opinions Below

The New York Court of Appeals rendered its decision without opinion. Its memorandum decision is reported in 297 N. Y. 617. The opinion of the Appellate Division of the Supreme Court is reported in 272 App. Div. 120. The opinion of the Special Term of the New York Supreme Court, allowing the order of prohibition, is not reported, but is printed at folios 14-52 of the record in the New York Court of Appeals. The opinion of the Erie County Court

* All folio references herein are to the printed record in the New York Court of Appeals, a copy of which has been submitted to this Court by petitioner.

in favor of granting the order vacating the judgment of the Erie County Court entered on July 16, 1937, similarly is not reported, but is printed at folios 97-142 of the record in the New York Court of Appeals.

Jurisdiction

This Court's jurisdiction is invoked under Section 237 of the Judicial Code (28 U. S. C. § 344), authorizing this Court to require, by certiorari, that there be certified to it for review and determination, any cause determined by the highest court of a state, where any title, right, privilege, or immunity is claimed under the United States Constitution. Petitioner has alleged that the decision of the New York Court of Appeals violated the Fifth and Fourteenth Amendments to the United States Constitution by depriving him of his liberty without due process of law.

Facts

Petitioner, Joseph Paterno, was indicted by the Grand Jury of Erie County, New York, on October 30, 1936 for the crime of criminally receiving stolen property (fols. 75-80). On November 10, 1936 he was arraigned and pleaded not guilty in the presence of his counsel (fol. 78). On April 14, 1937 petitioner again appeared in court, withdrew his former plea of not guilty and pleaded guilty to attempted grand larceny, second degree (fol. 80). That plea was accepted by the court upon the district attorney's recommendation that petitioner be permitted to plead guilty to such a "reduced charge" (fol. 82). On July 16, 1937, petitioner was sentenced to a term of one year and three months to two years and six months, execution of

which was suspended, and petitioner was placed on probation to make restitution of $75 (fols. 7-4).

Subsequently, on November 17, 1941, petitioner was sentenced to Attica State Prison by the County Court of Chautauqua County, New York, upon his plea of guilty to the crime of robbery, second degree. He was sentenced as a second offender to a term of not less than fifteen years nor more than thirty years. Petitioner's 1937 conviction in the Erie County Court was used as the basis for sentencing him as a second offender. Petitioner is still serving the Chautauqua County Court sentence in Attica State Prison, which sentence, by its terms, has not yet expired (fols. 59-60).

The proceedings below, which petitioner seeks to have this court review, originally were commenced by a motion to the Erie County Court, in the nature of *coram nobis*, to vacate the judgment entered upon petitioner's plea of guilty in 1937, upon the ground that the Erie County Court improperly accepted the reduced plea of guilty to attempted grand larceny, second degree under an indictment charging him with criminally receiving stolen property. The Judge of the Erie County Court before whom such motion was made indicated in an opinion that he was about to grant petitioner's motion, but urged that the District Attorney or Attorney General proceed against the Court by a writ of prohibition in order that the appellate courts might determine whether or not the Erie County Court had jurisdiction to grant petitioner's motion (fols. 41-2).

Accordingly, the present prohibition proceeding was brought in the Supreme Court to enjoin the Erie County Judge from proceeding with any of the steps proposed to be taken by him, as indicated in his opinion. The order of prohibition was granted by the Special Term of the New

York Supreme Court on the ground that the Erie County Court did not have jurisdiction to grant petitioner's motion, and such order of the Special Term was unanimously affirmed by the Appellate Division of the New York Supreme Court, with opinion; the order of the Appellate Division then was unanimously affirmed by the New York Court of Appeals, without opinion.

Prior to the present motion to the Erie County Court, petitioner had contested his incarceration by means of a writ of habeas corpus. The Appellate Division of the New York Supreme Court ordered that such writ of habeas corpus be dismissed on the ground that the remedy of habeas corpus was not available to petitioner (*People ex rel. Paterno* v. *Martin*, 268 App. Div. 956). The basis for the Appellate Division's decision was the case of *People ex rel. Wachowicz* v. *Martin*, 293 N. Y. 361, involving an identical situation, where the New York Court of Appeals held that in such cases habeas corpus was not proper.

Following this dismissal of his writ of habeas corpus petitioner made a motion to the County Court of Chautauqua County to vacate the judgment of conviction rendered in 1941, whereby petitioner was sentenced as a second offender, and petitioner moved for resentence. Petitioner based his motion upon a claim that the prior sentence by the Erie County Court was improper. The Chautauqua County Court denied petitioner's motion for resentence on the ground that it had no jurisdiction to entertain such a collateral attack upon the judgment of the Erie County Court (*People* v. *Paterno*, 182 Misc. 491).

The Issue

The sole question before this Court is whether the decision of the New York Court of Appeals to the effect that

the common law remedy of *coram nobis* is not available to petitioner to correct an alleged error of law made by the sentencing court, deprived petitioner of due process of law in violation of the United States Constitution.

We urge that no constitutional right of petitioner has been violated, inasmuch as various remedies were made available to petitioner by state law at the time of his conviction to correct any error of law which may have been made by the sentencing court.

POINT I

The decision of the New York Court of Appeals does not deprive petitioner of his liberty without due process of law.

Although petitioner relies on the Fifth as well as the Fourteenth Amendment to the United States Constitution in support of his position, this discussion is limited to an examination of petitioner's rights under the Fourteenth Amendment only, in view of the fact that the Fifth Amendment is a restriction on the Federal government only, and has no application to state action (*Hallinger* v. *Davis*, 146 U. S. 314, 319; *Jack* v. *Kansas*, 199 U. S. 372, 379-80).

The case at bar is not one where the State has not provided any method for the correction of errors of law which may have been made by the trial court. Various remedies were available to petitioner at the time of his first conviction. The fact that petitioner did not avail himself of such remedies at that time should not be considered as sufficient to support a claim that rights guaranteed by the due process clause have been violated. This argument, which will not be discussed, is all aside from the fact that the particular error of the sentencing court upon which

petitioner relies—that the court improperly accepted a plea of guilty to a crime not necessarily included in the indictment—did not constitute a violation of petitioner's constitutional rights. This Court has repeatedly held that indictment by a grand jury is not essential for due process (*Hurtado* v. *California*, 110 U. S. 516; *Frank* v. *Mangum*, 237 U. S. 309; *Dowdell* v. *United States*, 221 U. S. 325).

In the first place, under the provisions of the New York Code of Criminal Procedure petitioner could have appealed from the judgment of conviction of the Erie County Court, and any error of law could then have been corrected by the appellate courts (N. Y. Code of Criminal Procedure §515-17). It should be noted that all the facts upon which petitioner bases his claim of error appear on the face of the record. The record of petitioner's conviction by the Erie County Court in 1937 shows that petitioner was indicted for the crime of criminally receiving stolen property, and that record also shows that petitioner pleaded guilty under that indictment to the crime of attempted grand larceny, second degree. There is no reliance on any factor such as fraud or perjured testimony, which might have come to light some time after petitioner's conviction. Thus, had petitioner sought appellate review of his conviction within the statutory time provided therefor, which has long since expired, the appellate courts could have rectified any error in the ruling of the trial court (*Sherwin* v. *People*, 100 N. Y. 351; *People* v. *McDonnell*, 92 N. Y. 657).

Petitioner had other remedies available to him at the time of his conviction in 1937. Under Section 337 of the New York Code of Criminal Procedure petitioner could have moved at any time before judgment was rendered, to withdraw his plea of guilty and substitute a plea of not guilty (*Canizio* v. *New York*, 327 U. S. 82, 86). If such a motion

were improperly denied and judgment entered, an appeal could have been taken from the judgment of conviction, and upon such an appeal the intermediate order denying the application to withdraw the plea of guilty could have been reviewed (N. Y. Code of Criminal Procedure, § 517). A third alternative which was open to petitioner was to move in arrest of judgment after his plea of guilty, on the ground that the facts stated in the indictment did not constitute a crime (N. Y. Code of Criminal Procedure §§ 467-469).

In view of the existence of these corrective remedies which were available to petitioner at the time of his conviction, notwithstanding the fact that no remedy may now exist some ten years later when petitioner decides to raise the question, it is respectfully submitted that petitioner's contention of violation of the due process clause is without merit. As was pointed out by the Appellate Division of the New York Supreme Court below, petitioner sought and received a favor after his indictment. He was in no way compelled or coerced into pleading to the reduced charge. His indictment was for a crime cognizable by the Erie County Court and he himself was under the jurisdiction of that Court. Of all the persons in the courtroom at the time of his plea petitioner best knew whether or not he was guilty of the crime to which he plead, which crime grew out of, and was connected with, the circumstances of the crime for which he was indicted. There may have been an error of law when the court accepted his plea, but it was in no way harmful or prejudicial to petitioner and it was not such an error for which he now has a remedy. And, as the Appellate Division concluded, to say that correction of such an error must or should lead to the remedy sought by petitioner herein would be to disregard common sense and the ordinary proper administration of criminal law.

We urge that the principle set forth by this Court in the cases of *Canizio* v. *New York*, 327 U. S. 82 and *Gayes* v. *New York*, 332 U. S. 145 is likewise applicable here. As was stated in the Gayes opinion (page 148) with reference to the holding in the *Canizio* case, "whatever doubts may arise from the circumstances of a plea of guilty, if, before sentence is imposed, the opportunities required by the Constitution for meeting the legal implications of the plea are satisfied, the sentence must stand".

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

Dated: December 31, 1947.

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